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No. 1223

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

1223

THOMAS H. KEEGAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Thomas H. Keegan, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on February 19, 1963, and is not reported, but appears in the printed Appendix filed with, and certified by, the Clerk of the United States Court of Appeals as a part of this record, and transmitted herewith.

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment, was filed on the 2nd day of April, 1964. That opinion is not yet reported, but is set forth in the Appendix hereto, and in the certified copy of the record.

JURISDICTION

The order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was filed on the 2nd day of April, 1964. On May 19th, 1964 it was ordered that the petition for re-hearing be denied. (These orders appear in the Appendix hereto.) This petition is filed within thirty days of the denial of the petition for rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Was it not error for the Court of Appeals to rule that the grand jury testimony of a principal witness need not be turned over to the defense, where the defense had demonstrated on cross-examination that the witness had falsely testified before at least one, and possibly before two grand juries, that he had not given money to the defendant, but to other persons, particularly where the receipt of money by the defendant was the gravamen of the offense?

2. Did the Congress intend, concerning the payment and receipt of monies between union agents and employers, that the continuing agreement to pay and receive monthly amounts was the unit of offense, or did the Congress intend that each installment of the continuing agreement was a separate offense?

3. Where the Court of Appeals, in speaking of the degree of proof of awareness of the restrictions of a *malum prohibitum* offense, held in this case that the minimum proof to convict under 29 U.S.C. 186 was that the defendant showed "a reckless disregard fo that section", and the defendant offered precisely such an instruction, which used the same language as the same Court of Appeals had laid down in a prior case in an identical offense, was it not error for the Court of Appeals to approve of the trial court's denial to give the instruction, yet bottom its decision as to the degree of proof on that refused standard withheld from the jury?

4. Can knowledge or awareness of the fact of one's physical action be a substitute for the requirement of "willful" in a *malum prohibitum* offense, or, to put it another way, can a person knowingly do certain acts, and still not willfully violate a *malum prohibitum* statute, where there is no proof that he was aware of the proscriptions of the said statute?

5. Where the petitioner suffered a heart attack after indictment, and the case was continued for nearly a year, and the petitioner was examined by six doctors, three of whom were the defendant's medical authorities and three of whom were successive Chiefs of the Medical Section of the United States Public Health Service in Chicago, Illinois, appointed by the Court to examine the defendant at the instance of the government, and all six of whom recommended that putting the petitioner to trial would aggravate his illness, and could result in heart failure, did not the Court of Appeals err in sustaining the action of the trial court, which placed the petitioner on trial on the recommendation of still another government-suggested doctor, who opined thirty days after the last of the above-

stated examinations that petitioner could stand trial, and the petitioner was thereby placed in a position where, on overwhelming medical advice, he could not hazard the recognized physical danger of assuming the witness stand in his own behalf?

6. Did not the Court of Appeals err in holding that placing of the petitioner on trial, under the circumstances, was *merely* a matter of discretion of the trial court on the subject of continuances, thereby ignoring the petitioner's constitutional right to assert a defense, and its deprivation by forcing trial at a time when he could not defend himself, except at the risk of his life?

STATUTES INVOLVED

Subsections (a) and (b) of Section 302 of the Labor Management Relations Act, 1947, as amended, were amended by the Labor-Management Reporting and Disclosure Act of 1959 to read as follows: (186(a) and (b) Title 29 U.S.C.)

"Sec. 302. (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

"(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

"(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

"(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

"(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

"(b)(f) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

Section 302(a) and (b), before amendment on Sept. 14, 1959, read

(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

STATEMENT OF THE CASE

This is an appeal from a judgment of conviction on 46 counts of a 48-count indictment, charging violations of Section 186(b) of Title 29, United States Code. (Accepting a sum of money as a representative of employees of an employer engaged in an industry affecting commerce.)

The case was tried before a jury, which returned a verdict of guilty on all 46 counts, upon which a judgment of conviction was entered and sentence imposed, from which conviction and sentence an appeal was taken to the United States Court of Appeals for the Seventh Circuit.

This petitioner was sentenced to the custody of the Attorney General on February 19th, 1963 for imprisonment for a period of one year on each of Counts 1, 2, 3, 4 and 5 of the indictment, and a fine of $1,000.00 and costs of prosecution were assessed on each of said Counts 1, 2, 3, 4 and 5. Said sentences to run consecutively and fines cumulative. On each of Counts 6 through 26, 28 through 39, and 41 through 48, the sentence was for a period of one year. Said sentences are to run concurrently with the sentence imposed on Count No. 5. The defendant is to stand committed until the fines and costs are paid.

For violations declared to be misdemeanors, this petitioner, without any prior record, has been sentenced to 5 years in the custody of the Attorney General and fined $5,000.00 and costs.

The petitioner, Thomas H. Keegan, appealed his conviction to the United States Court of Appeals for the Seventh Circuit.

The errors complained were: That the evidence tended to prove only one offense; that the proof failed to establish an essential element; that the Court erred in refusing to permit the defendant's inspection of the grand jury minutes; that there was a complete failure of proof as to Counts 41 through 48; that the Court erred in ordering the defendant to trial, in violation of his Constitutional right to a fair trial and to have the effective assistance of counsel; that the Court erred in his restriction of cross-examination, and that the Court erred in the giving and refusal of instructions.

The United States Court of Appeals for the Seventh Circuit affirmed the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, and denied the defendant's petition for rehearing.

STATEMENT OF FACTS

On the 21st day of September, 1961 the defendant, Thomas H. Keegan, was indicted in a 48-count indictment for violations of Section 186(b), Title 29, United States Code.[1] (*Two of the counts were dismissed* at the trial.)

---

[1] Count 1 read in part as follows: That * * * Interstate Motor Freight System * * * was engaged in * * * an industry affecting commerce * * *. That * * * certain of the employees of Interstate were * * * members of * * * Local 710, * * * International Brotherhood of Teamsters * * *. That * * * Thomas H. Keegan * * * was a representative and official of Local 710 and was a representative of employees of Interstate * * *.

That on or about October 2, 1956, at Cook County, Illinois, in the Northern District of Illinois, Eastern Division, Thomas H. Keegan, defendant herein, did unlawfully, wilfully and knowingly receive and accept from Interstate the sum of $200; in violation of Section 186(b), Title 29, United States Code.

Counts 2 through 48, both inclusive, are dated from November, 1956 to July, 1961, and are all in the amount of $200.

The defendant filed an appearance bond in the amount of $3,000.00 which, immediately after the verdict, was raised to $25,000.00. The defendant is presently at large on $25,000.00 bond, pending the appeal.

On September 27, 1961 the defendant entered a plea of not guilty.

On or about December 15, 1961 the defendant had a heart attack and was confined to the Bethesda Hospital at Chicago, Illinois. Motion was made to continue the cause, on the basis that the defendant was unable to proceed to trial. On December 19, 1961 the Court ordered that Dr. David Crosby, Chief Medical Officer of the United States Public Health Service, examine the defendant, and that he secure all records and assistance from the attending physician, one A. Kushner, and a heart specialist, one Dr. Yesnick, whom Dr. Kushner called in consultation.

Dr. Crosby reported to the Court that:

> "His prognosis is guarded and I would not venture to say when he may become fit or trial, if ever." (A. 27)

The defendant was examined again on April 9 and again in June, 1962, this time by Dr. Remsberger of the Public Health Service. Meanwhile, the case was continued. A motion was again made on October 5, 1962 that Mr. Keegan be examined by the Public Health Service. On that date the Court stated that if a new examination were ordered and supposing:

> "That he feels the patient is able to withstand the rigors of a court action, that he is able to assist his attorney in the defense, and that he does not feel that a court action at this time would materially aggravate his heart condition, would you then agree to abide by that report and go to trial?" (A. 41)

Counsel for the defendant answered in the affirmative, and the government agreed that the report would be binding on both sides.

Accordingly, the defendant was again examined by the Public Health Service. The case was then continued to November 14, 1962, when the report was submitted, this time by Dr. Imboden, Chief of the Medical Section of the United States Public Health Service, as Dr. Crosby had been transferred to another duty station. Upon his finding that the defendant was unfit to stand trial, the government then spurned its agreement and asked that the defendant be examined by someone else. Dr. Imboden's report said in part:

> "I do not—and the word 'not' is underlined—expect that the basic condition will improve to the extent that this recommendation can be changed at some future date." (A. 52 and 366)

His report stated that a court trial was likely to aggravate his illness and "may result in a precipitation of mio-cardio heart failure" (A. 52). Defense counsel upon request by the Government advised Dr. Kushner to secure another examination by a cardiologist. This was done by Dr. A. H. Rosenblum, a member of the University of Illinois teaching staff. The government, after hearing his concurring view, insisted that he be examined by one Dr. Paul. Dr. Paul, after examining him, reported that, in his opinion, he thought the defendant could stand trial.

Whereupon, the Court ordered the case for trial in approximately thirty days, over the objection of the defendant.

TRIAL EVIDENCE

The government and the defense stipulated that, during the years 1956 through 1961, and at all times pertinent to the period of the indictment, certain employees of Interstate Motor Freight System were employed as truck drivers, and were members of Local 710 of the International Brotherhood of Teamsters; that, during these years, Thomas H. Keegan was a business agent for Local 710, which was a labor organization.

The first witness, Arthur Holt, was the office manager of Interstate, and worked from September, 1956 through July, 1957. He testified that the defendant Keegan would call him on one day and come in on the following day. During the intervening period, Holt would draw a check in the amount of $200, send it over to a currency exchange, where it was cashed, and the cash would be placed in an envelope. When Keegan appeared on the following day, he picked up the money and walked out. Apparently, this witness had inherited this practice, and there was no evidence introduced as to when it started, or what the amounts were for. The starting point of September, 1956 was apparently occasioned by the statute of limitations, as the indictment was returned in September, 1961.

The next witness was William E. Carey, who took over the "arrangement" after Holt, and he testified that he continued this until the end of November, 1959, and made monthly payments to Keegan in the same manner as Holt had. He did not know what the payments were for, but merely continued the "arrangement".

Howard Ryerson was the last witness who testified to some payments, and he could not remember any specific time nor any amounts.

Gary P. Katano was a cost clerk, and was the one who normally went over to the currency exchange to secure the cash, which he turned over to Carey.

Mr. J. L. Burge testified that he was a vice president of the operation, and he testified concerning the interstate nature of the operation, and that he had made arrangements for Keegan to deal with the witness Ryerson, who, incidentally, was not an employee of Interstate, but who leased to Interstate certain tractor equipment to pull their trailers. He also testified that relations with the union were excellent; that he also sat in on the grievance committee, but could not remember ever having sat in on one with Mr. Keegan. He testified that in the course of his experience with Mr. Keegan, he did not know Mr. Keegan to do anything against the interests of the employees or union members.

The witness Hobart Schaibly was the vice president and treasurer of Interstate, and he testified concerning the handling of checks and disbursements, and the records maintained by Interstate, and that the checks representing the payments to Keegan were charged to Mr. Rahilly, the president of Interstate, who was not called to testify by either party.

The government rested and, after the defense motion for acquittal was overruled, the defendant called seven officials of various trucking organizations and one bank official, as to his character and reputation in the community.

After these witnesses were concluded, and out of the presence of the jury, counsel for the defendant then made the following statement:

> "I state at this time to the Court that in view of the evidence in this record made prior to trial and upon the—I wasn't going to go this far but now that they are gone—the medical record here, I have consulted with my client, I have reviewed this matter with two of the doctors and in the light of the entire medical history of the defendant, Keegan, I am compelled to submit this cause to the jury without putting him on the witness stand. I have gone to trial in this cause—I mean I have been put to trial, Mr. Keegan has been put to trial over my objection. It is one thing to have him sit here for two or three days and possibly he seems to have come through that, but in view of his grave condition, the fact that at least five or six doctors have indicated the seriousness of it, against one by the government, I am unwilling to put him on the witness stand and subject him to the rigors of cross-examination in this case.
>
> "Now, for this reason, I am compelled by virtue of the circumstances to rest the defendant's case."

After the defense rested, the government rested.

Motion for judgment of acquittal was made at the close of all evidence. The matter was submitted to the jury, and the jury returned a verdict of guilty, as to all counts of the indictment, except as to the two which were dismissed on the motion of the government.

REASONS FOR GRANTING THE WRIT

This Court should exercise its jurisdiction in this case for the following reasons:

I. If *Gordon* v. *United States*, 344 U.S. 414, 421, and *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, is decisive, then the decision of the Court of Appeals below is in conflict with such decisions of this Court holding that, where a "particularized need" is shown, the defendant is entitled to the grand jury transcript.

II. This decision of the Court of Appeals for the Seventh Circuit is in agreement with a decision of the Third Circuit, and in conflict with a decision of the Tenth Circuit and another Seventh Circuit case, as well as some district court cases. This Court should exercise its jurisdiction, in order to bring uniformity of decision upon the unit of offense in the numerous criminal cases brought under the provisions of Section 186.6, Title 29, United States Code.

III. The Court of Appeals below has so far sanctioned a departure from the accepted and usual course of judicial proceedings by a lower court as to call for an exercise of this Court's supervision, by affirming a conviction for a knowing and wilful violation of the law, in a case where the standard of proof of willfulness was submitted in an instruction by the defendant on the basis of the exact language of the Court of Appeals in a prior similar case opinion, and the trial court refused to give it and yet the Court of Appeals affirmed the conviction on the same standard as was withheld from the jury's consideration.

IV. The decision of the Court of Appeals affirming the action of the trial court, in placing a person on trial

when he could not hazard the recognized physical danger of assuming the witness stand in his own behalf, constituted a denial of due process and an absolute violation of the defendant's constitutional right to defend himself. This Court should exercise its supervisory power, in order to correct such an obvious departure from the accepted and usual course of judicial proceedings.

I.

In ruling upon the defendant's right to see the Grand Jury testimony where upon cross examination, material inconsistencies were demonstrated, this Court stated in *Gordon* v. *United States*, 344 U.S. 414, 421:

> "The elementary wisdom of the best evidence rule rests on the fact that the document is a more reliable, complete and accurate source of the information as to its contents and meaning than anyone's description, and this is no less true as to the extent and circumstances of a contradiction. We hold that the accused is entitled to the application of that rule, not merely because it will emphasize the contradiction to the jury, but because it will best inform them as to the document's impeaching weight and significance. This was a case where a principal witness had made contradictory statements."

This Court later said in *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395:

> "It does not follow, however, that the grand jury minutes should never be made available to the defense. * * * 'Certainly, disclosure is wholly proper where the ends of justice require it.' *United States* v. *Socony Vacuum Oil Co.*, (310 U.S. at 234).
>
> "The burden, however, is on the defense to show that 'a particularized need' exists for the minutes which outweighs the policy of secrecy. We have no

> such showing here. As we read the record, the petitioners fail to show any need whatever for the testimony of the witness Jonas. They contended only that they had a 'right' to the transcript because it dealt with the subject matter generally covered at the trial."

Other courts have made inroads on "particularized need." See *De Binder* v. *United States*, 292 F. 2d 737 (CADC); *Gordan* v. *United States*, 299 F. 2d 117 (CADC); *Jackson* v. *United States*, 297 F. 2d 195; *Harrell* v. *United States*, 317 F. 2d 580; *United States* v. *Spangelet*, 258 F. 2d 338 (CA 2); *United States* v. *Zborowski*, 271 F. 2d 661; *United States* v. *McKeever*, 271 F. 2d 669; *United States* v. *Hernandez*, 290 F. 2d 86, and *United States* v. *H.J.K. Theatre Corp.*, 236 F. 2d 502. Even the trial court in the case at bar said:

> "I hope some time we get a clear, unequivocal opinion from our own Court of Appeals on the subject of grand jury minutes."

In view of the direct showing on cross examination (A 127-131) of the fact that a principal defense witness contradicted himself, we submit that this case falls squarely within the *Gordon* and *Pittsburgh Plate Glass Co.* cases. The opinion is squarely in conflict with decisions of this Court.

In the case at bar, a principal witness testified on direct that he gave money to Keegan. After direct the prosecution turned over certain statements to the Court pursuant to Sec. 3500, T. 18, U.S.C. Among these were the Grand Jury transcript from Chicago and Grand Rapids. The Court denied the defense the Grand Jury transcripts. The witness admitted under oath on cross examination that he had told two FBI agents on one occasion and

the grand jury in Grand Rapids, Michigan that he had given the money (the monthly payment of $200, which is the crux of the offense) to the terminal managers, and not to the petitioner Keegan. He also admitted that "possibly" he told the same story to the grand jury in Chicago, Illinois, which returned the indictment. The defense again requested to examine both grand jury transcripts, on the showing made. This request was denied. The Court treated this as a matter within the purview of Section 3500, Title 18, United States Code, made an *in camera* inspection, the nature of which was raised on appeal (Pet. Main Brief below, p. 53, footnote 1), and, as stated, denied the defense any inspection.

> "Essentially four reasons have been advanced as justification for grand jury secrecy. (1) To prevent the accused from escaping before he is indicted and arrested, or from tampering with the witnesses against him. (2) To prevent disclosure of derogatory information presented to the grand jury against an accused who has not been indicted. (3) To encourage complainants and witnesses to come before the grand jury and speak freely without fear that their testimony will be made public thereby subjecting them to possible discomfort or retaliation. (4) To encourage the grand jurors to engage in uninhibited investigation and deliberation by barring disclosure of their votes and comments during the proceedings." *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 3 L. ed. 2d 1323, 79 S. Ct. 1237, (dissenting opinion, p. 405).

None of the above reasons was advanced by the prosecution and indeed, such reasons did not exist.

This Court should exercise its supervisory power to bring about some uniformity on the subject of the pro-

duction of Grand Jury testimony and whether or not they are to be produced under Section 3500, Title 18, U.S.C., or Rule 6(e) of the Federal Rules of Criminal Procedure upon a showing of particularized need.

II.

In the Court of Appeals for the Seventh Circuit there have been two prior opinions on cases brought under Section 186(b), Title 29 United States Code. The first was *United States* v. *Inciso*, 392 F. 2d 374 and the second was *United States* v. *Gibas*, 300 F. 2d 836. Both of these cases involved numerous counts, each of which were bottomed upon the separate payments by different employers of union member employees to a union representative of such employees. In the *Inciso* case the payments were numerous and made over an extended period of time. The government in the *Inciso* case totaled all of the payments as to each employer and returned an indictment charging the defendant Inciso with a 22 count indictment making each aggregate or total payment by the employer the unit of offense. There were 22 employers who made hundreds of payments. The same was true of the government's theory of the unit of offense in *United States* v. *Gibas*, (300 F. 2d 836). Each employer was the subject of a separate offense.

In the case at bar, each payment which was made monthly by the *same* employer and each payment was made the subject of a separate count. The "arrangement" in the case at bar continued over a four year period and the indictment contained 48 counts.

Prior to trial the defendant urged that under *Inciso* and under this Court's ruling in *United States* v. *Universal*

C.I.T. Credit Corporation, 344 U.S. 218 that there was only one offense charged and moved that the government elect upon which count it intended to proceed. The court denied the motion and then the case proceeded to trial on all 48 counts. Petitioner was convicted and and sentenced to consecutive terms of 1 year each on five counts and concurrent terms on remaining counts. The totality, however, of the sentence is that the defendant received a sentence of 5 years, plus a $5,000 fine.

The Third Circuit in *United States* v. *Alaimo*, 297 F2d 604 held that each individual receipt of checks from the employer over an extended period constituted a separate offense. The court, however, did say at page 607 that:

> "It is, of course, true, as the court points out in the *Universal C.I.T.* case, that the question of whether the legislation looks toward penalizing a course of conduct for individual offenses is not always sun-clear. However we see no reason for concluding that in this case a course of conduct is struck at."

The Court of Appeals in the case at bar adopted the reasoning of *United States* v. *Alaimo*, (See opinion, page 3) and stated that the Petitioner's reliance on their decision in *United States* v. *Inciso*, 292 F. 2d was misplaced.

> "There, the defendant was charged in a 22 count indictment with violation of Section 186(b) each count naming a different employer as payor. Thus the issue of the same employer making more than one payment with defendant being indicted for each payment was not presented and determined in *Inciso*."

The petition for rehearing set forth *in extenso*, the argument of the government in the *Inciso* case where they strongly urged that the unit of offense was the

course of conduct or continued payment to each employer. (Pet. for Rehearing pp. 2-4) The defendant in *Inciso* had raised multiplicity as to each count. The Court of Appeals is in error when it states that this issue was not before it.

Nonetheless, the Seventh Circuit in *United States* v. *Inciso*, 292 F. 2d 374 stated:

> "* * * however, under Section 186(b) the willful receipt from each *employer* (except under specific provisions of Section 186(c) which includes approved insurance plans) is made unlawful. *Korholz* v. *United States*, 10 Cir., 1959, 269 F. 2d 897 * * *." (P. 381) (Emphasis Supplied).

Thus in an early decision the Seventh Circuit followed *Korholz* v. *United States* hereinafter discussed, and here decided this case on the basis of *Alaimo* although the Petitioner had every right to rely on the Seventh Circuit's holding in the *Inciso* case.

In *Korholz* v. *United States*, 269 F. 2d 897 there was a one count indictment alleging as one crime a series of payments, charged in the aggregate, by a single employer to an employee representative in violation of 186 U.S.C. 29. The court held that the indictment was proper and not duplicitous. The amount was approximately $2,300.00, paid in thirteen installments. Similarly in *United States* v. *Posner*, 39 Labor Cases 66,150 (1960) the United States District Court for the Southern District of New York held:

> "Upon an examination of the indictment before us, setting forth a periodic payments in the separate counts, and in their historical sequence, their uniformity in amount and recurring frequency is striking, and an assumption would not be unwarranted that they were made pursuant to a single, continuing

agreement to give and receive $25,000 a month. Certainly the statute is ambiguous when attention is centered on its proscription to pay or deliver. Did Congress intend the agreement to constitute a separate crime, as well as each payment pursuant to the agreement? We have our doubts, and, heeding the injunction of the Supreme Court, must resolve them in favor of Lenity. See *United States* v. *Durkin*, 161 F. Supp. 287."

The choice of the government to completely inundate a union official may also be criticized. In *United States* v. *Tedesco*, 309 F. 2d 286 (C.A. 2, 1962), Judge Friendly, said:

"* * * The multiplication of counts in indictments has become a matter of serious concern because of the threat thereby posed to the effective working of the jury system and the possibility of sentences out of proportion to the true gravity of the offense. * * *."

Petitioner respectfully submits that this Court ought to exercise its supervisory power and resolve the important question thus raised by the conflict between the various circuits and within the Seventh Circuit itself.

III.

In *United States* v. *Incisco*, 292 F. 2d 380, the Court of Appeals for the Seventh Circuit said:

"Knowledge or awareness of the law is generally irrelevant in proving *mens rea* in major felony convictions. Further, in certain 'public policy' crimes, strict liability is imposed. *However, in many such crimes, the sanction is limited to a fine or a short jail term.* Here, on the contrary, a fine of $10,000 per violation and a year's imprisonment can be imposed for disregarding the provisions of Sections

186(b) and (d). *We hold that the term 'wilfully violates' in Section 186(d) contemplates proof of an awareness of the restrictions of that section or a reckless disregard for that section.*" (Emphasis supplied).

The defense tendered an instruction which used the exact words of the Court of Appeals in the *Lucas* case. (Defendant's refused Instruction C-A. 352).

> "Each of the counts in the indictment charge that the defendant 'did unlawfully, willfully and knowingly receive and accept from Interstate the sum of $200.00'. These words, as used in the indictment, require proof of the awareness of the restrictions of Section 186(b) and (d), or a reckless disregard for that Section."

Thus we have a reliance by petitioner on the Court's standard as set forth in a prior similar case (involving acceptance of monies by a union official from an employer of members of his union).

The trial Court in refusing the tendered instruction, instead gave the following:

> "The word 'wilfully' means that the person knowingly and intentionally committed the acts which constitute the offenses charged.
>
> "The word 'knowingly' imports only a knowledge of the existence of the facts in question, when those facts are such as to bring the act or omission within the prohibition of the law. The word does not require, as a part of its meaning, that there be any knowledge or awareness that such act or omission is in fact prohibited by law." (A. 339)

Quite aside from the defendant's objection (A. 347) to this definition as not embodying the law on this subject

in the Seventh Circuit, this instruction merges *knowledge of a physical act* and the wilful commission of *said act*. The two words are not synonymous. As this Court said in *Morissette* v. *United States*, 342 U.S. 246, at 270:

> "Knowledge, of course, is not identical with intent . . . ."

The Court's instruction merged the knowing or conscious doing of an act with the element of intent or *evil-ful violation of a malum prohibitum statute* without any proof of the proscription of the statute.

However, reverting as we must to the chameleon-like attitude of the Seventh Circuit in *Inciso vis-a-vis* the case at bar, the Court affirmed the trial Court on the question of proof of willingness by this standard (Op. p. 8a)):

> "As stated in *Inciso, supra*, defendant need not be aware that his actions are a violation of § 186 and the jury was so instructed in the present case. *The minimum proof to convict under § 186 is that defendant showed 'reckless disregard for that section'.*" *United States* v. *Inciso, supra.* (Emphasis supplied).

This standard clearly was submitted by this petitioner for the jury's consideration in his refused instruction. The Court of Appeals in affirming by the above language did so on a *standard* set forth in the prior *Inciso* case, refused by the trial Court in the case at bar, yet offered as justification of conviction here. The standard was not given to the jury. The petitioner submits that this is but another example of a practice condemned by this Court in *Russell* v. *United States*, 369 U.S. 749, and *Cole* v. *Arkansas*, 333 U.S. 196. The conviction stands on the same type of a shifting rationale and effectively denies to the petitioner procedural due process.

If the jury had been instructed in accordance with the Seventh Circuit opinion in *Incisa, supra*, upon which the petitioner had a right to rely if the principle of *stare decisis* is to be given a meaning the the defense of a criminal case who can say what their verdict may have been?

IV.

This portion of the petitioner's complaint is that the important constitutional questions involved in forcing him to trial under all of the circumstances were brushed aside by the Court of Appeals for the Seventh Circuit in holding that this matter was merely an application for a continuance and, as such, was purely a matter of discretion, "not subject to review by this Court, unless it be clearly shown that such discretion has been abused."

The statement of facts sets forth in some detail the problem which had arisen in connection with putting the defendant to trial, under the circumstances. What the Court of Appeals failed to mention in its opinion was that, prior to the examination of Chief Imboden of the Public Health Service, the government had agreed to abide by his findings. If Dr. Imboden had stated that the defendant was unfit to stand trial, the government promised that the cause would be dismissed. (A. 42). When Dr. Imboden reported that the defendant could not stand trial, and further emphasized this by a statement that he did not believe the defendant's condition would ever improve, the government thereupon deprecated the ability of the United States Public Health Service. So far as the examination by Dr. Paul, a later government-suggested doctor, is concerned, there was no similar agreement to abide by his opinion on the part of the defendant and the government. The defendant merely consented to have Dr. Paul examine him. Prior to Dr. Paul's examination, there

had been six (6) doctors who had stated that the rigors of a court trial would be likely to aggravate his illness and might result in precipitation of heart failure.

Under all of the circumstances, the trial court not only abused its discretion but effectively created a situation where the defendant was unable to defend himself. The Court of Appeals apparently lost sight of that aspect of this case. By forcing defendant to trial at the time, in the face of the single contradictory medical testimony, the defendant was deprived of an opportunity to defend himself, due to his health. How could he be expected *not* to follow his own doctor's advice, as well as the other doctors who were also in agreement? If all six of them said: "Don't do it; it might kill you."; and one said: "Go ahead—do it.", it would be a very foolish person, indeed who would disregard the advice of the six doctors. So it is here. What could the petitioner Keegan do, under all of the circumstances?

The question presented here was oversimplified by the Court of Appeals. It was not merely a discretionary act in denying a continuance which the Court stated it was loath to review. It was a deprivation of Keegan's absolute constitutional right to assert a defense. To compel him to follow the dissenting Dr. Paul—as the risk of his life—in order to defend himself is just plain error, and constitutes a gross abuse of discretion. The constitutional aspects of this matter cannot be swept under the rug.

> "The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' *Johnson* v. *Zerbst*, 304 U.S. 458, 462 • • •."
>
> *Gideon* v. *Wainwright*, 372 U.S. 335.

The petitioner herein respectfully submits that this action of the trial court constituted a denial of due process and an absolute violation of his constitutional right to defend himself. This Court should exercise its supervisory power, in order to correct such an obvious departure from the accepted and usual course of judicial proceedings.

CONCLUSION

Wherefore, for the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD J. CALIHAN, JR.,
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Attorney for Petitioner.

APPENDIX A.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 14190 September Term. 1963—January Session. 1964

United States of America. *Plaintiff-Appellee,* v. Thomas H. Keegan. *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 2, 1964

Before HASTINGS, *Chief Judge*, and SCHNACKENBERG and KILEY, *Circuit Judges*.

HASTINGS, *Chief Judge*. Defendant Thomas H. Keegan was charged in a 48-count indictment with violations of Section 302(b) of the Labor Management Relations Act of 1947, 61 Stat. 157, 29 U.S.C.A. § 186(b).[1]

[1] Section 186 (b) and (d), Title 29 U.S.C.A., reads:

"(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

"(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guity of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year or both."

Following a trial by jury and a verdict of guilty on forty-six counts, defendant was adjudged to be guilty and sentence was imposed by the trial court. From this judgment defendant has appealed.

Count 1 of the indictment is typical of each of the forty-eight counts returned September 21, 1961, and is set out in the margin below.[2]

---

[2] "The August 1961 Grand Jury charges:

1. That at all times hereinafter mentioned, Interstate Motor Freight System, a corporation, hereinafter referred to as Interstate, maintained a truck terminal and offices in Cook County, Illinois, and was engaged in the trucking business as a common carrier of property by motor vehicle in interstate commerce, an industry affecting commerce, in the course of which business, the aforesaid Interstate Motor Freight System did transport goods and material by motor vehicle from Cook County, Illinois, to places outside the State of Illinois and did transport goods and materials by motor vehicle from places outside the State of Illinois to Cook County, Illinois;

2. That at all times hereinafter mentioned certain of the employees of Interstate were employed as truck drivers and were members of the Highway Drivers, Dockmen and Helpers, Meat Drivers and Helpers Union, Local 710, a division of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers Union, a labor organization hereinafter referred to as Local 710.

3. That at all times hereinafter mentioned, Thomas H. Keegan defendant herein, was a representative and official of Local 710 and was a representative of Employees of Interstate as aforesaid, which said employees were members of Local 710, and which said employees were then and there employed in an industry affecting commerce; and

4. That on or about October 2, 1956, at Cook County, Illinois, in the Northern District of Illinois, Eastern Division, Thomas H. Keegan, defendant herein, did unlawfully, wilfully and knowingly receive and accept from Interstate the sum of $200.00; in violation of Section 186(b), Title 29, United States Code."

But for varying dates of alleged violations, the remaining forty-seven counts are unchanged throughout the indictment, except that counts forty-one through forty-eight do not allege a specific day; rather, they allege a specific month. Each count alleges that $200 was received from Interstate.

It was stipulated that during the years 1956 through 1961, and at all times pertinent to the period in the indictment, certain employees of Interstate Motor Freight System were employed as truck drivers, and were members of the Highway Drivers, Dockmen and Helpers, Meat Drivers and Helpers Union, Local 710, a division of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers Union. That, during these years, defendant was a business agent for Local 710 and that, during this period, Local 710 was a labor organization.

Counts twenty-seven and forty were dismissed on motion of the Government.

Defendant was sentenced to the custody of the Attorney General on February 19, 1963 for imprisonment for a period of one year on each of counts one, two, three, four and five of the indictment, and a fine of $1,000 and costs of prosecution were imposed for each of these counts. These sentences were to run consecutively and the fines were cumulative.

On each of counts six through twenty-six, twenty-eight through thirty-nine and forty-one through forty-eight, defendant was sentenced for a period of one year, these sentences to run concurrently with the sentence imposed on count five.

On appeal, defendant contends that certain rulings and instructions of the district court constituted prejudicial error, that the Government failed to prove an element of the offense and that counts forty-one through forty-eight were so vague as to violate the Sixth Amendment.

1.

Defendant alleges that the court erred in not requiring the Government to elect a single count of the indictment upon which to prosecute and dismiss the remaining counts. Defendant argues that the statute does not make a separate crime out of each payment, but rather, it is a course of conduct which is prohibited, and therefore only one offense, if any, is made out by the Government's case. Defendant relies upon, *inter alia*, *Bell* v. *United States*, 349 U.S. 81 (1955); *United States* v. *Universal Corp.*, 344 U. S. 218 (1952); and *United States* v. *Inciso*, 7 Cir., 292 F.2d 374 (1961), cert. denied, 368 U. S. 920. We disagree.

The Third Circuit was presented with this same issue in *United States* v. *Alaimo*, 3 Cir., 297 F. 2d 604 (1961), cert. denied, 369 U. S. 817. We agree with and adopt its reasoning, which is set out in the margin below.[1]

---

[1] "In urging reversal the first point the appellant makes is that the Government should have been compelled to elect which one of the thirty-four counts it chose to stand upon. The appellant's theory is that there were not thirty-four offenses committed here but only one. For this proposition he relies heavily upon the Supreme Court's decision in *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 73 S. Ct. 227, 87 L. Ed. 260 (1952). There the Court, through Justice Frankfurter, discussed the question whether a statutory provision defining an offense is directed toward a course of conduct or toward each performance of the forbidden act. The Court came to the conclusion that the Fair Labor Standards Act proscribes a course of conduct and not a series of individual offenses. The appellant also relies upon *Bell* v. *United States*, 349 U. S. 81, 75 S. Ct. 620, 99 L. Ed. 905 (1955), in which the prosecution charged two violations of the Mann Act where the defendant in one trip took two women across a state line for immoral purposes. But, as the Court pointed out in that case, this was an improper endeavor to turn a single transaction into multiple offenses. In contrast to *Universal C.I.T.* and *Bell*, one may point to convictions for offenses against the narcotics statutes and against statutes dealing with the illicit manufacture, transportation and sale of untaxed alcohol beverages; where a sin-

Defendant's reliance on our decision in *United States* v. *Inciso*, *supra*, is misplaced. There, defendant was charged in a 22-count indictment with violation of Section 186(b), each count naming a different employer as payor. Thus, the issue of the same employer making more than one payment, with defendant being indicted for each payment, was not presented and determined in *Inciso*.

(Continued)

gle act may constitute an offense against several prohibitions of the statute and be penalized accordingly. It is, of course, true, as the Court points out in the *Universal C.I.T.* case, that the question whether the legislation looks toward penalizing a course of conduct or individual offenses is not always sun-clear. However, we see no reason for concluding that in this case a course of conduct is struck at. Here were individual receipts of money from the company over many months, and each time the defendant received a check from the company he was doing that which the statute forbade. We think the analogy to *Patton* v. *United States*, 42 F. 2d 68 (8th Cir.), *conforming to the Supreme Court's answer to certified questions*, 281 U.S. 276, 50 S. Ct., 253, 74 L. Ed. 854 (1930), is clear. There, the defendant was charged with several payments to a prohibition agent for 'protection' in violation of the statute. The Court had no difficulty in adopting the Government's theory that the acts of the defendants in making payments every two weeks were separate violations. That case is directly in point, as are decisions having to do with the effect of bribery in more than one instance by the same defendant. See *Biddle* v. *Wilmot*, 11 F. 2d 505 (8th Cir. 1926); *cf. Langford* v. *United States*, 200 F. 2d 237 (10th Cir. 1952).

"We conclude without hesitation here that the Government's case was sound and that each unlawful payment to the defendant constituted a separate offense. We think it quite reasonable that Congress should have provided for a separate punishment each time an employee representative places a price upon two weeks of labor peace, just as it did for each transaction in which prohibition agents were paid for two weeks' protection. *Cf. Patton* v. *United States*, supra. The fact that the prohibited act constitutes a misdemeanor instead of a felony we think has no bearing on the conclusion." *Id.* at 605, 606.

We hold that each payment by Interstate to defendant constituted a separate violation of Section 186(b).

II.

Defendant alleges that the court erred in instructing the jury concerning the word "willfully" in Section 186(d) and that the Government failed to prove that defendant willfully violated the Act.

The court in instructing the jury with respect to willfullness charged as follows:

> "The payment and receipt of money here must be willfully and knowingly done.
>
> "The word 'willfully' means that the person knowingly and intentionally committed the act which constitute the offenses charged.
>
> "The word 'knowingly' imports only a knowledge of the existence of the facts in question, when those facts are such as to bring the act or omission within the prohibition of the law. The word does not require, as a part of its meaning, that there be any knowledge or awareness that such act or omission is in fact prohibited by law.
>
> "The question of willfullness and knowledge is a matter for you to determine from all the facts and circumstances disclosed by the evidence.
>
> "A person generally intends the natural consequences of his acts. However, willfullness and knowledge refer to a state of mind, and it is not possible to look into a man's mind and read the thoughts and knowledge that exist there at any given time.
>
> "It is seldom possible to prove knowledge by direct evidence of what knowledge a person may have had at a particular time.
>
> "The state of a person's mind, and the knowledge there existing, generally can be determined only by his acts, by his conduct, by his manifestations, and in de-

termining the question of the willfullness, knowledge and intention of any defendant in this case, you should take into consideration not only the direct evidence bearing thereon, but all the facts and circumstances surrounding said defendant in connection with his acts, and the offices and positions he may have held.

"Consider the reasons for his conduct, and what he did." . . .

Defendant tendered the following instruction which was refused by the court:

"Each of the counts in the indictment charge that the defendant 'did unlawfully, wilfully and knowingly receive and accept from Interstate the sum of $200.00.' These words, as used in the indictment, require proof of the awareness of the restrictions of Section 186(b) and (d), or a reckless disregard for that Section."

At the close of the court's instructions to the jury, defendant objected "to the Court's definition of 'willfully and knowingly' and the fact that the Court indicated, [*sic*] or failed to indicate, that these acts should be done with an evil or corrupt purpose or bad motive."

In *United States* v. *Inciso*, 7 Cir., 292 F. 2d at 380, we held "that the term 'willfully violates' in Section 186(d) contemplates proof of an awareness of the restrictions of that section or a reckless disregard for that section." Defendant, agreeing with this holding, contends that the instruction failed to convey this definition to the jury. We hold otherwise.

The instruction in issue was patterned after the instructions given in *United States* v. *Gibas*, 7 Cir., 309 F. 2d 836 (1962), cert. denied, 371 U. S. 817, and *United States* v. *Inciso*, *supra*.[1] The records in *Gibas* and *Inciso* reveal that the instructions given there were substantially the same as the one under consideration here.

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[1] These instructions do not appear in the reported opinions.

While *Gibas* held that the receipt of money need not be "with an evil or bad purpose," *supra* at 840, thus disposing of one of defendant's objections in this case, the issue concerning the adequacy of the definition of "willfully violates" was not raised in either case.

As stated in *Inciso, supra*, defendant need not be aware that his actions are a violation of § 186 and the jury was so instructed in the present case. The minimum proof to convict under § 186 is that defendant showed "reckless disregard for that section." *United States* v. *Inciso, supra.*

Whether or not defendant was reckless is subjective and difficult of proof. Reckless conduct, in this context, consists of two elements: knowledge of the material facts surrounding the proscribed conduct and knowledge that this conduct is likely to be illegal. See Hall, General Principles of Criminal Law 120 (2d ed. 1960).

The first element, knowledge of the facts, is to be determined by the subjective method, i.e., whether defendant had *actual knowledge*. The second element, while requiring subject knowledge, may be proved by the objective method, i.e., whether a reasonable man would be aware that such conduct would likely be illegal. Hall, *op. cit. supra* 120, 155, 165.

Instructing the jury as to the first element of "reckless" and withholding from it the second element was done in *United States* v. *Alaimo* (E.C.M.D.Pa.), 491 F. Supp. 625 (1961) aff'd 3 Cir., 297 F. 2d 604, cert. denied, 369 U.S. 817, as follows:

> "A person who is a representative of employees employed in an industry affecting commerce may be held to have wilfully violated § 186(b) upon a showing that he received or accepted money from the employer of such employee (or from the agent of such employer) with knowledge (1) that he was receiving or accepting money, and (2) that the person who was giving him the money was an employer of employees (or the agent of such employer) that he represented." *Id.* at 627.

We hold that the jury was properly instructed on the term "willfully violates."

Defendant's other contention concerning the word "willfully" is that the Government failed in its proof of this element of the offense.

Several witnesses were called by the Government who testified concerning payments to defendant. Typical of such testimony was that of Arthur Holt.

Holt was office manager of Interstate during September, 1956, and was in charge of office personnel and office records.

Holt testified that one morning in September, 1956, defendant called him and asked him if he would be in the office the following morning. He said that he would and, after the conversation, he went over to a desk in which blank checks were kept and took out two drafts. They were each made out for $100 and payable to cash. They were made on or about October 2, 1956, and bore the signature of Holt.

Upon completing the drafts, Holt took them to a currency exchange, received $200 in cash and put the cash in a white envelope. He put the envelope in the center drawer of his desk.

The following morning he placed the envelope on the upper right hand corner of his desk. About 9:30 that morning defendant came into Holt's office and asked about problems, new members, or grievances. Defendant then took out a wallet and a small loose-leaf note book held together with a rubber band and placed them on top of the envelope containing the money. After defendant left the office, the wallet, note book and envelope were missing.

Holt testified to similar occurrences on other occasions and other witnesses testified to substantially similar incidents.

These constant payments and the manner in which they were made provided ample evidence from which the jury

could find that defendant willfully accepted money with knowledge he was a representative of employees in an industry affecting commerce and that he received the money from the employer of such employees.

Viewing the evidence in a light most favorable to the Government, as we must do, we hold the Government sustained its burden of proving that defendant "willfully" violated § 186(b).

III.

The Government, in its examination of witness Holt, produced, pursuant to Section 3500, 18 U.S.C.A., Holt's testimony before grand juries in Grand Rapids, Michigan and Chicago, Illinois. This testimony was offered to the court for an *in camera* inspection. The court, after conducting such an examination, ruled that the Government need not turn this testimony over to defendant.

On direct examination Holt testified, as stated previously in section II of this opinion, that he gave the money directly to defendant. On cross-examination, Holt stated that "it is possible" I told the grand jury in Grand Rapids and Chicago that I gave the money to the terminal manager.

Defendant thereupon moved for inspection of Holt's grand jury testimony, which motion was denied.

On appeal, defendant states that he demonstrated a "particularized need" for the grand jury testimony and the district court erred in not allowing him to inspect it.

The district court examined *in camera* the grand jury testimony in question and transmitted it, sealed, to our court. We have read the sealed testimony of Holt and agree with the district court that there are no material inconsistencies between Holt's testimony in the district court and his testimony before the grand juries.

We hold the district court did not err in refusing to permit defendant to examine the grand jury testimony in question. *United States* v. *Meeks*, 7 Cir., 327 F. 2d 222, 226-227 (1964).

IV.

Counts forty-one through forty-eight charged defendant with accepting $200 from Interstate "on or about" July 1960, September 1960, November 1960, January 1961, March 1961, April 1961, May 1961 and July 1961. Defendant alleges these counts were so vague and indefinite as to be fatally defective and in violation of defendant's rights under the Sixth Amendment.

We do not reach this contention. The sentences imposed on counts forty-one through forty-eight were concurrent with each other and concurrent with count five.

We hold that count five can be sustained and therefore it is unnecessary to review counts forty-one through forty-eight. *Hirabayashi v. United States*, 320 U. S. 81, 85 (1943); *United States v. Cephas*, 7 Cir., 263 F. 2d 518, 519 (1959).

V.

Defendant argues that the district court abused its discretion in requiring defendant to go to trial, in view of defendant's physical condition.

On or about December 15, 1961, defendant had a heart attack and was confined to a hospital in Chicago, Illinois. Motion was made to continue the case on the ground that defendant was unable to proceed to trial. The court ordered, on December 19, 1961, that Dr. David Crosby of the United States Public Health Service examine defendant and that he secure all records and assistance from the attending doctor, Dr. Kushner, and a heart specialist, Dr. Yesnick.

The case was continued to January 2, 1962. On that date, Dr. Crosby's report indicated that, in his opinion, defendant was not able to stand trial at that time. Dr. Crosby suggested an additional examination in three months.

On or before April 9, 1962, defendant was examined by Dr. Rensberg of the Public Health Service and the

cause was continued for another three months. Dr. Remsberg recommended that the matter be re-evaluated in three months.

In June, 1962, the Public Health Service again examined defendant and the report stated that his condition had improved. The cause was then continued to October 15, 1962 for trial.

The doctors for defendant did not agree that his condition had improved and a motion was made on October 5, 1962 that defendant be examined by the United States Public Health Service. The case was continued to November 14, 1962 when a report was submitted to Dr. Imboden, Chief of the Medical Section of the United States Public Health Service. He found that defendant was unfit to stand trial.

Further hearing was held on November 16, 1962, at which time the Government suggested that in its opinion further examination by a cardiologist agreeable to defendant and the Government should be had. Pursuant to an agreement of the parties, Dr. Ogiesby Paul, a cardiologist of Chicago was selected to make a further examination. It was agreed that if the examination should show a cardiac condition detrimental to defendant, the Government would dismiss.

Dr. Paul concluded his report as follows:

> "Although I have therefore concluded that . . . [defendant] may have coronary heart disease, it is not my belief that he is so incapacitated from this condition that a court trial would be detrimental to his physical condition or highly likely to bring on a heart attack. One can never predict precisely the outlook for any person with heart disease. However, it would be my opinion that the strain of a court trial should not prove to be an undue hazard to him from the point of view of his health."

The Supreme Court in *Goldsby* v. *United States*, 160 U. S. 70, 72 (1895) stated, "In a recent case we said: 'That

the action of a trial court upon an application for continuance is purely a matter of discretion not subject to review by this court, unless it be clearly shown that such discretion has been abused, is settled by too many authorities to be now open to question.' *Isaacs* v. *United States*, 159 U. S. 487, and authorities there cited."

In view of the many continuances granted by the district court and the report of Dr. Paul, we can not say, after applying the above standard of review, that the district court abused its discretion in requiring defendant to proceed to trial.

VI.

Defendant cites five instances where the circuit court restricted cross-examination and asserts that such restrictions constituted error.

We considered this question in *United States* v. *Lawinski*, 7 Cir., 195 F. 2d 1 (1952). What we had to say there is applicable here. *Id.* at 7, 8. In controlling the cross-examination of witnesses, the trial judge is permitted the exercise of a wise discretion and is in the best position to determine how far it should proceed.

We have carefully examined each alleged improper restriction and hold that the district court did not abuse its discretion and committed no reversible error in such rulings.

VII.

Finally, defendant alleges error by the district court in instructing the jury, "I referred to some exceptions a few moments ago [49 U.S.C.A. § 1806(c)] and I say in that connection that there was no evidence presented during this trial indicating that any payments allegedly made by Interstate Motor Freight System was of the nature of any of the statutory exceptions."

Defendant points to no evidence in the record and we have found none which would support any of the exceptions listed in § 1806(c).

We hold that the issue of exceptions was properly kept from the jury. *United States* v. *Gibas*, 7 Cir., 300 F. 2d 836, 838-839 (1962), cert. denied 371 U. S. 817.

The judgment of the district court appealed from is in all respects affirmed.

AFFIRMED.

APPENDIX B.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois

Thursday, April 2, 1964

Before

Hon. John S. Hastings, Chief Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee* No. 14190 vs. THOMAS H. KEOGAN, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, in accordance with the opinion of this Court filed this day.

APPENDIX C.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois. 60610

Tuesday, May 19, 1964

Before
Hon. John S. Hastings, Chief Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Roger J. Kiley, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 14190 — vs.

THOMAS H. KEEGAN,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that defendant-appellant's petition for rehearing of this cause be, and the same is hereby, Denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 192

THOMAS H. KEEGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 331 F. 2d 257.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1964. A petition for rehearing was denied on May 19, 1964. The petition for a writ of certiorari was filed on June 17, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was entitled to see the grand jury testimony of a government witness.

2. Whether each payment of money received by a union official from a single employer is a separate offense under Section 302 of the Labor-Management Relations Act.

3. Whether ignorance of the law is a defense under Section 302.

4. Whether petitioner was physically competent to stand trial.

STATUTE INVOLVED

The Labor-Management Relations Act of 1947, as amended, 73 Stat. 537, 538, 29 U.S.C. 186(a)-(b) (Supp. V, 1963), provides in pertinent part:

> Sec. 302. (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce;
>
> . . .
>
> (b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on 46 counts of an indictment charging him with receiving payments of money from an employer whose employees belonged to a labor union, of which petitioner was a representative, in violation of Section 302(b) of the Labor-Management Relations Act of 1947, as amended, 73 Stat. 538, 29 U.S.C. 186(b) (Supp. V, 1963) (A. 12). Under each of the first five counts, petitioner was sentenced to serve one year in prison and to pay a fine of $1,000, the sentences to run consecutively. He was sentenced to one year's imprisonment on each remaining count, the latter sentences to run concurrently with the sentence under count five—resulting in a total sentence of five years and $5,000 (A. 359-360). The court of appeals affirmed the conviction (Pet. App. 1-14; 331 F. 2d 257).

Between October 1956 and July 1961, petitioner, the business agent of a local labor union, received 46 payments of money from agents of a trucking company operating in interstate commerce whose drivers belonged to petitioner's union (A. 75, 137-138, 238). Counts 1-10 were proved by the witness Arthur Holt, who testified that, while he was office manager of the company's Chicago terminal, he made ten monthly payments of $200 to petitioner (A. 76-111).

"A" refers to petitioner's appendix in the court of appeals.

Counts 11-26 and 28-39 were proved by similar testimony from the terminal manager, William E. Carey, who made the monthly payments to petitioner after Holt resigned (A. 136-185). The remaining counts, 41-48, involved payments made between November 1959 (when Carey left the office) and July 1961. These payments were made pursuant to an arrangement under which the company agreed to pay more rent to Howard Ryerson, who leased trucks to the company, in return for Ryerson's agreement to make payments to petitioner (A. 179, 212-216, 263-267).

ARGUMENT

1. After Holt testified on direct examination that he had cashed checks and paid the proceeds directly to petitioner, defense counsel made a demand for production of documents under 18 U.S.C. 3500. At this point, government counsel gave the defense a statement that Holt had given to the F.B.I. and also produced for inspection by the judge the transcript of Holt's testimony before the grand jury (A. 117-118). The judge inspected the minutes but refused to turn them over on the ground that they were not within the purview of 18 U.S.C. 3500 (A. 118-120).[1] On cross-examination, Holt admitted that in his statement to the F.B.I., he had said that after cashing the checks he gave the proceeds to his office supervisor, rather than to petitioner (A. 126-128). Holt also admitted that he had given the same account to grand juries in

[1] A copy of this statement is being lodged with the Clerk of the Court.

Grand Rapids and Chicago (A. 129-130). Petitioner then renewed his motion for production of the grand jury minutes under 18 U.S.C. 3500, and the judge again denied the motion (A. 130, 136).

It is established that grand jury minutes are not producible under the Jencks Act, 18 U.S.C. 3500. *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 398. The issue was never presented to the judge in terms of a "particularized need" for the transcript, as prescribed in this Court's opinion in *Pittsburgh Plate Glass*, 360 U.S. at 400. Nor could petitioner show any such need. He had been given the F.B.I. statement, which contained the same contradictory account of the payments as the grand jury testimony, and the witness had admitted making the inconsistent statements under oath. Neither court below, after examining the grand jury minutes, found any other material inconsistencies. Thus the refusal to turn over the minutes could not have been prejudicial. *See Rosenberg* v. *United States*, 360 U.S. 367, 370-371; *United States* v. *Santore*, 290 F. 2d 51, 67-68, (C.A. 2), certiorari denied, 365 U.S. 834.

2. It has been held that each payment of money received by a labor representative is a separate offense under Section 302. *United States* v. *Alaimo*, 297 F. 2d 604 (C.A. 3), certiorari denied, 369 U.S. 817 (holding 34 payments by one employer to a union representative resulted in 34 separate offenses); see also *United States* v. *Inciso*, 292 F. 2d 374 (C.A. 7), certiorari denied, 368 U.S. 920 (holding 22 payments, each by a different employer, resulted in 22 offenses). Moreover, in the

closely analogous cases of bribery and "protection" payments, each payment constitutes a separate offense. *Patton* v. *United States*, 42 F. 2d 68 (C.A. 8); see *Biddle* v. *Wilmot*, 14 F. 2d 505 (C.A. 8).

3. The trial court correctly instructed the jury that ignorance of the provisions of Section 302 was not a defense (A. 339). The instructions merely reiterated a settled principle of criminal law. *E.g., Ellis* v. *United States*, 206 U.S. 246. Although this principle is not applicable to certain offenses that require specific intent to evade a legal obligation or prohibition known to the defendant, the misdemeanor statute involved here is not within that narrow exception. *United States* v. *Carter*, 311 F. 2d 934, 943 (C.A. 6), certiorari denied *sub nom. Fifer* v. *United States*, 373 U.S. 915; *United States* v. *Ryan*, 232 F. 2d 481 (C.A. 2). Any contrary suggestion in the language of earlier decisions of the Seventh Circuit—see *United States* v. *Gilus*, 300 F. 2d 836, 839-840, certiorari denied, 371 U.S. 817, and *United States* v. *Iacino*, 292 F. 2d 374, 379, certiorari denied, 368 U.S. 920—has been disapproved by the holding of that court in the present case.

4. Contrary to petitioner's final contention, the record shows that he was not physically incompetent to stand trial. Before the trial, the court granted three continuances on doctor's recommendations (two of which were by United States Public Health Service physicians) that petitioner had not recovered sufficiently from a heart attack to make trial advisable (A. 16-27). Finally, in June 1962, the Public Health Service found petitioner able to

stand trial (A. 40-41). In October 1962, when the case was called for trial, petitioner requested another heart examination by the Public Health Service, which the court granted after the parties agreed to abide by the medical findings. Specifically, petitioner agreed to go to trial if the findings were favorable to the government, and the government agreed to accept another continuance or to dismiss the indictment if the findings were favorable to petitioner (A. 38-42).

The Public Health Service physician reported that it was doubtful whether petitioner could ever stand trial (A. 44-46, 366-368). Because none of the examining Public Health Service physicians was a heart specialist, the government insisted that a cardiologist should examine petitioner before the indictment should be dismissed (A. 47-58). A Dr. Maher, known to the trial court as a distinguished cardiologist, was agreed upon; but, after Dr. Maher indicated that his theories about the type of heart attack involved would probably compel a finding that petitioner could stand trial, another cardiologist was chosen (A. 56-57, 64-70). The second cardiologist, Dr. Paul, found that petitioner was able to undergo the strain of a trial (A. 59-63). Consequently, there was more than ample evidence to support the trial court's finding that petitioner was able to go to trial.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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